IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR.

JUDGMENT.

Binj Raj vs. Sukhdeo & anr.

S.B. Civil Second Appeal No.34/1988 against the judgment and decree dated 24.11.1987 passed by the Addl. District Judge Bikaner in Civil Appeal No.75/1985.

Date of Judgment: April 26, 2006.

PRESENT
HON'BLE MR. PRAKASH TATIA,J.

Ms. J.L. Purohit, for the appellant.
Mr. K.R. Saharan,for the respondents.

BY THE COURT:

Heard learned counsel for the parties.

The plaintiff-appellant's suit for eviction filed on 11.3.1980 was decreed by the trial court against the defendant-respondent on the ground of parting with possession of the suit property by the tenant by handing over it to defendant no.2. The judgment and decree of the trial court on this issue was reversed by the first appellate court by judgment and decree dated 24.11.1987. Hence the plaintiff has preferred this appeal.

Following substantial question of law was framed by this Court while admitting the appeal on 17.7.1989:-

"*Whether the findings of the First Appellate Court that*

defendant Sukh Dev has no sub-let the demise premises to Mool Chand is perversed ?"

Brief facts of the case are that the plaintiff filed the suit for eviction of his tenant on 11.3.1980 with the allegations that the suit property was let out to defendant no.1 from 1.6.1971. The defendant paid rent upto December, 1979 but did not pay the rent for the months of January and February, 1980. The plaintiff submitted that the suit property is required for the personal need of the plaintiff and the defendant has already taken another shop for his business. The defendant also constructed a water-tank without the consent of the landlord and the defendant handed over possession of the suit shop to defendant no.2. On these grounds the plaintiff sought decree for eviction. The suit was amended subsequently and the plaintiff pleaded that after filing of the suit, more rent became due in the defendant and the defendant became defaulter in payment of rent.

The defendant submitted written statement and denied the plaint allegations and stated that the suit shop was taken on rent by defendant no.1 but it was for joint Hindu family of the plaintiff and defendant no.2 and the defendant no.2 is sitting in the shop being brother of defendant no.1 that too, since the time of tenancy. The trial court framed issues and the plaintiff gave his statement in support of his plaint allegations and produced witnesses PW-2 Vallabh Das and PW-3 Prahalad Das. Both the defendants tenant and his brother, alleged sub-lettee, gave their

statements to counter the evidence of the plaintiff.

The trial court held that since the plaintiff and defendant both are living separately and having separate *Rashan-card* and defendant no.2 Mool Chand admitted that he is sitting in the shop, therefore, that amounts to parting with possession of the suit property by defendant no.1 by handing it over to defendant no.2.

The first appellate court while considering the finding of the trial court on question of parting with possession, held that the suit shop has not been sub-let by defendant no.1 to defendant no.2.

The learned counsel for the appellant vehemently submitted that the first appellate court failed to appreciate the facts of the case which is apparent from the reasons given by the first appellate court in its judgment under challenge. It is submitted that the plaintiff never pleaded that the suit shop has been let out by the tenant-in-chief to the sub-tenant and thereby created sub-tenancy. The case of the plaintiff was only of parting with possession as the possession of the suit shop was handed over to defendant no.2. The first appellate court upheld the finding of the trial court that the defendant no.1 and defendant no.2 though they are brothers but they are living separately and their family is not joint family. In that situation, coupled with the admission of the defendant that defendant no.2 is in possession of the suit shop, parting with possession of the suit shop stands fully proved. The learned counsel

for the appellant relied upon the judgment of the Hon'ble Apex Court delivered in the case of Singer India Ltd. vs. Chander Mohan Chadha & others (AIR 2004 SC 4368) and the earlier judgment of the Hon'ble Apex Court delivered in the case of M/s Shalimar Tar Products Ltd. v. H.C.Sharma and others (1988(1) SCC 70) and the judgment delivered in the case of Roop Chand vs. Gopi Chand Tholia (1989(2) WLN 33 (SC).)

I considered the submissions of the learned counsel for the appellant and perused the record.

It will be just and proper to recapitulate the facts of the case. The plaintiff filed the suit in the month of March, 1980 and at that time the rent of only two months was due in the tenant. It has not been mentioned by the plaintiff from whom the plaintiff accepted rent upto December, 1979, in the case where allegation is of parting with possession of the suit property by the tenant and handing it over to defendant no.2. Therefore, admittedly, the landlord accepted the rent upto December, 1979 from the tenant. The tenant's case is that the suit shop was taken on rent by the defendant No.1-tenant for the benefit of joint Hindu family and defendant no.2 being brother, was sitting from the date when the suit shop was taken on rent. The plea taken by defendant finds support from the statement of plaintiff's own witness PW-2 Vallabh Das, who categorically stated on oath that from the beginning, defendant no.2 is sitting in the shop and he stated that since

1971 he used to pass through this shop, therefore, he knows it well. The defendant No.2 is the alleged person in occupation independently, Mool Chand, and who has not been disclosed in plaint as brother of defendant No.1 stated on oath that he is sitting in the shop from the beginning as brother of the tenant Sukh Deo. It has never been suggested to said witness Mool Chand that he alone is in exclusive possession of the suit property. Same is the position with the statement of DW-2 Sukh Deo-the original tenant. No question has been put to said Sukh Deo that he parted with possession of the suit shop and handed it over to Mool Chand and Mool Chand is in exclusive possession of the suit shop. Virtually there is no cross-examination from both the defendants on the plea taken by the defendant that Mool Chand is sitting in the shop only as brother of defendant Sukh Deo. Mool Chand categorically stated that the entire business in the shop is of his brother Sukh Deo who is admittedly the tenant in the shop. To prove the fact of parting with possession, it was the duty of the plaintiff to prove that fact by evidence. The plaintiff even did not disclose in the plaint when the possession of the suit shop was handed over to defendant no.2 by defendant no.1. The plaintiff in his statement, for the first time, disclosed that the possession of the suit shop was handed over to defendant no.2 by defendant no.1 about 6-7 years ago. This fact, if considered along with the fact of acceptance of the rent by the plaintiff

from the defendant-tenant till December,1979, clearly shows that only a vague plea was taken by the plaintiff in his plaint which he wanted to improve by submitting that the suit shop was handed over to defendant no.2 by defendant no.1. Therefore, in fact, the plaintiff miserably failed to prove that the possession of suit shop has been handed over to defendant no.2 by defendant no.1-tenant and defendant no.2 is in exclusive possession of the suit shop. The defendants proved their stand that defendant no.1 is the owner of the business in shop and the defendant no.2 is sitting in the shop for the business of defendant no.1 and he is not doing his own business in the shop.

So far as judgment relied upon by the learned counsel for the appellant delivered in the case of Singer India Ltd.'s case (supra), the facts are entirely different. In the said case Hon'ble the Apex Court held that:-

> "even if there is an order of a Court sanctioning the scheme of amalgamation under Ss. 391 and 394 of the Companies Act whereunder the leases, rights of tenancy or occupancy of the Transferor Company get vested in and become the property of the Transferee Company, it would make no difference insofar as the applicability of S.14(1)(b) is concerned, as the Act does not make any exception in favour of a lessee who may have adopted such a course of action in order to secure compliance of law."

The foundation fact for seeking eviction of tenant on the ground

of parting with possession by tenant is parting with possession by the lessee and giving it to third person with right to occupy the premises exclusively. The transferee, in Singer India Ltd.'s case(supra) acquired the right to occupy the premises exclusively with right to exclude the tenant-in-chief. Therefore, in those facts, the tenant lost his possession and, therefore, he was liable to be evicted. Such is not the position in the present case.

The judgment of the Hon'ble Apex Court delivered in the case of M/s Shalimar Tar Products Ltd.'s case (supra) also has entirely different facts. In that case the allegation was of sub-letting of the premises by the tenant without written consent of the landlord and there was concurrent findings of fact on question of sub-letting. The Hon'ble Apex Court held that the concurrent findings of fact recorded by the courts below deserve to be accepted by the Supreme Court and the question of waiver of the landlord would not arise in view of statutory requirement of obtaining written consent of the landlord before sub-letting of the suit premises. Here it is nobody's case that the suit shop was handed over to defendant with implied consent of the landlord.

The same is the position with the facts of the case of Roop Chand's case(supra), wherein as a matter of fact, Hon'ble the Apex Court found that the tenant leased out major portion of the premises to social club and thereby the tenant parted with possession of the part of

the suit property and hence liable to be evicted.

In view of the above, the finding recorded by the trial court on the question of sub-letting on the grounds mentioned by the trial court in its judgment deserves to be upheld with additional reasons supplied by this Court.

So far as the first appellate court's approach is concerned, that may be faulty because the first appellate court has mentioned about the plea of sub-letting by defendant no.1 but that was not the case of the plaintiff but in substance, it appears that the first appellate court was also conscious about the fact of parting with possession which is one of the ingredients of sub-letting but because of that fault by the first appellate court, no relief can be granted to the appellant and, therefore, the substantial question of law framed by this Court on 17.7.1989 is decided against the appellant.

The appeal of the appellant is, therefore, dismissed. No order as to costs.

(PRAKASH TATIA),J.

mlt.